# Case Law Update

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## Discussion Points

- Stop-loss Provision
- Application of K.S.A. § 44-523(f)
- Prevailing Factor
- Neutral Risk Defense
- When payment of an award becomes due
- Payment of past due medical expenses
- Drug Defense
- Clear and Convincing Evidence Standard

# *Via Christi Hosps. Wichita, Inc. v. Kan-Pak, LLC*, 310 Kan. 883, 451 P.3d 459 (2019)

Application of Stop-loss Provision in Schedule of Medical Fees

# *Fee Schedule Authorities*

- The Schedule of Medical Fees provides maximum allowable reimbursement hospitals can receive for workers compensation treatment.
- Maximum fees are calculated pursuant to the Medicare Severity Diagnosis Related Groups (MS-DRG).
- Stop-loss Provision
  - If the total charges of an inpatient hospital stay equaled or exceeded $65,000, those charges are multiplied by 70 percent to determine the allowed reimbursement.

# 2011 vs. 2019 Stop-loss Provisions

## 2011 Stop-loss Provision

If the MS-DRG level of reimbursement exceeds the $60,000 stop-loss threshold, the facility shall be paid billed charges multiplied by 70% or the MS-DRG level **whichever is least**

Evidence presented that the Division accidentally included “whichever is least” in the 2011 stop-loss provision

## 2019 Stop-loss Provision

If the total charges for the hospital inpatient stay equal or exceed the minimum stop-loss threshold, the total charges are then multiplied by seventy percent (70%) to determine the maximum allowable reimbursement

The 2019 provision does not include “whichever is least” language

# *Via Christi Hospitals Wichita, Inc. v. Kan-Pac, LLC.*

- Claimant received extensive treatment for burns at Via Christi.
  - Via Christi billed $1,048,569.00 in medical care
- Respondent paid $136,451.60 and alleged full payment under the 2011 Schedule of Medical Fees
- Under the MS-DRG schedule, Respondent owed Via Christi $136,451.60.
- Under the stop-loss provision, Respondent owed Via Christi $732,426.97—70% of the billed charges.

# *Via Christi* continued

- ALJ and Board awarded $136,451.60 pursuant the schedule's plain language
- Court of Appeals reversed- Board's enforcement of the maximum medical fee schedule was unreasonable, arbitrary, and capricious because the applicable fee limiting provision had been accidentally created.
- The Supreme Court reversed Court of Appeals
  - The fee schedule's narrow purpose is to resolve fee disputes- usually between the carrier and medical provider.
  - The plain regulatory language supports Board's decision.
    - "When regulation's meaning is clear from the plain language used, courts generally should give the regulation its plain-language meaning"

# Takeaways

- Plain language rules the day.
- The fee schedule has been amended to remove “whichever is least” language from the stop-loss provision.
- The stop-loss provision likely trumps MS-DRG schedule under the 2019 Fee Schedule.

# *Castro-Trejo v. Moreno*, 456 P.3d 557 (Kan. Ct. App. 2020)

K.S.A. § 44-523(f): Application of Dismissal Provision

# 2006 and 2011 Versions of the Statute

## K.S.A. Supp. 2006 44-523(f)

Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within ***five years from the date of filing an application for hearing*** … shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein.

## K.S.A. Supp. 2011 44-523(f)

In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within ***three years from the date of filing an application for hearing*** … the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the three year limitation provided for herein.

# *Castro-Trejo v. Moreno*

- Castro-Trejo was injured in 2015 when he fell from the roof of a two-story house.
  - Employed by Charlie Hernandez, a sub-contractor of Moreno.
- Application for Hearing filed against Hernandez on July 8, 2015 and Moreno on August 11, 2015.
  - Castro-Trejo never filed a Motion for Extension.
- Castro-Trejo filed a Notice of Intent in January 2017.
- Castro-Trejo extended a settlement offer to Moreno on August 14, 2017.
  - Moreno's counsel needed to get authority.
- Castro-Trejo's counsel alleged repeatedly following up in 2017 and 2018 with no response.
- On October 11, 2018 Moreno sought dismissal under K.S.A. § 44-523(f)(1).
- Castro-Trejo requested for an extension of the Statute of Limitations, arguing equitable estoppel should preclude dismissal because ongoing settlement negotiations could have resolved the claim.

# *Castro-Trejo* continued

- ALJ Dismisses
  - The ALJ denied Castro-Trejo's request for an extension of Statute of Limitations under the doctrine of equitable estoppel
- Board affirms
  - "Castro-Trejo was not lulled by Travelers into a sense of security that he need not protect his rights, including the need to file a motion to extend the three year time frame."
- Court of Appeals affirms
  - "There is no evidence that Moreno and Travelers' counsel ever actively or substantively engaged in settlement negotiations that would lull Castro-Trejo into a sense of security. Any attempt to negotiate a settlement appears to be one-sided on Castro-Trejo's part."
  - "There was no deception on the part of Moreno and Travelers enough to lull Castro-Trejo to sleep on his rights."

# Takeaways

- Dismissal is certainly a possibility if caution is not taken.
- Settlement negotiations do not provide a get-out-of-jail-free card.
- Equitable estoppel to bar application of the statute of limitations requires an element of deception.
- The statute contains no limitation on when the motion can be filed. Therefore, best practice is to file the motion with filing of the Application for Hearing.
- Even if a Motion for Extension is filed, Respondents should seek an order with a firm deadline.

# *Banks v. Spirit Aerosystems Inc., 457 P.3d 213 (Kan. Ct. App. 2020)*

Validity of Prevailing Factor Statute

# Prevailing Factor Statute

## K.S.A. § 44-508(d) & (e)

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift. **The accident must be the prevailing factor in causing the injury.** "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. **The repetitive trauma must be the prevailing factor in causing the injury.** "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

## K.S.A. § 44-508(g)

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

## *Banks v. Spirit Aerosystems Inc.*

- Banks was denied benefits when the Board found his work was not the prevailing factor causing his shoulder impairment.
- Banks argued the prevailing factor statutory language is "so vague as to be judicially void and unenforceable."

## *Banks* continued

- The Court of Appeals rejected Banks' argument.
- The void-for-vagueness doctrine does not apply to workers compensation proceedings.
- "The definition of "prevailing factor," although sometimes difficult to apply to particular facts and possibly ambiguous, does not run afoul of due process protections for being impermissibly vague."

# Takeaways

- The prevailing factor standard is enforceable.
- Any ambiguities in the prevailing factor statute are to be determined pursuant to the particular facts of each case.

# K.S.A. § 44-508(g)

Application of prevailing factor

# *Munoz v. Sw. Med. Ctr.*, 459 P.3d 835 (Kan. Ct. App. 2020)

- Munoz alleged she sustained a 25% whole body impairment when she tripped and fell by an elevator for an unknown reason.
- A pre-accident MRI revealed degenerative changes throughout the back.
  - Medical records revealed pre-accident low back complaints.
- A post-accident MRI revealed structural changes in the back not present in the pre-accident MRI.
- On remand, the ALJ awarded benefits for a 5% low back impairment for soft tissue damage, but found work was not the prevailing factor causing the structural changes.
- The Board affirmed.
- Munoz appealed to the Court of Appeals arguing the structural changes were compensable under *Le v. Meats*, 52 Kan. App. 2d 189, 364 P.3d 571 (2015).

# *Munoz* continued

- The Court of Appeals affirmed the Board's decision.
- The Court found Munoz's structural changes were not compensable, as she had not proven her work was the prevailing factor causing the structural changes.
- "Munoz' argument ignores Le's prevailing factor analysis under K.S.A. 2019 Supp. 44-508(f)(2)(B)(ii). Although an accidental injury resulting in a new physical finding may be compensable despite the fact the accident aggravated the claimant's preexisting condition, the accident must also be the prevailing factor causing the claimant's resulting disability or impairment."

# *Cramer v. Presbyterian Manors*, 448 P.3d 502 (Kan. Ct. App. 2019)

- Cramer experienced a sudden pain in her back at work, which she attributed to loading 50 and 30-pound capacity washing machines.
- Cramer was diagnosed with a herniated disc/lumbar strain and previously asymptomatic degenerative disc disease throughout Cramer's back that were rendered symptomatic by the accident.
  - Dr. Burton opined Cramer's work was the prevailing factor causing the herniated disc/lumbar strain, with Cramer's other permanent back impairment related to preexisting conditions.
- The ALJ and Board adopted Dr. Burton's opinion and awarded benefits for a 2% whole body impairment.
  - Cramer appealed, arguing disability or impairment from an aggravated preexisting condition is recoverable if it results from an injury that is not solely an aggravation of a preexisting condition.

# *Cramer* continued

- The Court of Appeals rejected Cramer's argument.
- The Court held the aggravation of Cramer's degenerative disc disease was not compensable under the *Le* standard, as the aggravation was not caused primarily by work.
- "Here, the only recoverable injury is Cramer's lumbar strain/herniated disc. While this injury may have also caused pain by aggravating the preexisting disc disease in other areas of Cramer's spine, the work accident was not the primary factor in causing that resulting impairment."

# Takeaways

- Even under *Le*, claimants still must prove work is the prevailing factor causing a physical change in the body.
- A previously asymptomatic condition is still not compensable simply because a workplace injury aggravates the condition or renders it symptomatic.

# K.S.A. § 44-508(f)(3)(A)

Application of neutral risk defense

# Neutral Risk and “Arising Out of and In the Course”

K.S.A. § 44-508(f)(3)(A)

- (3)(A) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

***

- (ii) accident or injury that arose out of a neutral risk with no particular employment or personal character

## Cases Interpreting Neutral Risk Defense

- *Munoz v. Sw. Med. Ctr.*, 459 P.3d 835 (Kan. Stat. Ann. 2020): claimant's fall in a workplace hallway due to an unknown cause was not barred as a neutral risk because she was walking to perform a work task, giving walking down the hallway a particular employment character.
- *Netherland v. Midwest Homestead of Olathe Operations LLC.*, 448 P.3d 497 (Kan. Ct. App. 2019): Claimant's fall in a workplace kitchen due to an unknown cause was not barred as a neutral risk because the claimant was clocking out and talking to a co-worker at the time of the accident, thus giving the risk of falling a particular employment character.

# Takeaways

- Walking to perform a work task gives walking a particular employment character.
- Neutral risk defense is narrowly applied.
- Like *Munoz*, look for a prevailing factor defense.

# *Aikens v. Gates Corp.*, 462 P.3d 189 (Kan. Ct. App. 2020)

When payment of an Award becomes due

# Penalties Statutes

## K.S.A. § 44-512a

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than $100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of $25 or the sum equal to 10% of the amount which is past due on the medical bill.

## K.S.A. § 44-551(l)

All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a, and amendments thereto, made by an administrative law judge shall be subject to review by the workers compensation appeals board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation. Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556, and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

## *Aikens v. Gates Corp.*

- On May 1, 2018, Aikens was awarded benefits for injuries sustained in work-related car accident.
- On May 8, Aikens filed a demand for compensation pursuant to the Award. Gates sought review the following day but did not seek a stay of the Award.
- On June 6th, before the Board reviewed the Award, Aikens sought penalties pursuant to K.S.A. § 44-512a. The ALJ awarded penalties. Gates appealed, arguing the Award was not due until disposition by the Board.
- The Board then reversed the ALJ's Award on Aikens' original claim, finding she did not sustain a permanent injury.
- The Board reversed the ALJ's penalty ruling, finding Gates had no obligation to pay benefits during the Board's review.

## *Aikens* continued

- The Court of Appeals held Aikens' application for penalties was premature.
- "Under K.S.A. 2019 Supp. 44-551, there are three possibilities when an award could become payable: (1) If any party seeks review by the Workers Compensation Appeals Board, the Board must issue its decision within 30 days of when the parties submit arguments; payment becomes due when the Board issues its decision on the award. (2) If the Board does not issue its decision within 30 days of the parties' arguments to the Board, payments for any medical or disability compensation must begin on the 31st day after argument. (3) If no party seeks the Board's review of an ALJ's award, that award becomes due after the time for seeking review expires."

# Takeaways

- An application for penalties is premature prior to the Board initiating review.
- An application for penalties likely become timely on the 31st day after the parties present arguments to the Board, even if the Board has not rendered a decision.
- Best practice is to file an application to stay payment of an Award.

# *Gould v. Wright Tree Serv. Inc.*, 465 P.3d 202 (Kan. Ct. App. 2020)

Penalties and reimbursement for medical treatment

# *Gould v. Wright Tree Serv.*

- Gould sustained significant burn injuries when he lit a cigarette after dousing himself with gasoline.
- The ALJ found Gould's injuries were not compensable. Gould appealed to the Board. The Board reversed and awarded benefits.
- Wright appealed to the Court of Appeals on September 22, 2015. On October 8, 2015, Gould filed an application for penalties for nonpayment of the Board's Award. On October 15, 2015, Wright filed a motion with the Board to stay the award. The Board and Court of Appeals denied the motion.
- On January 11, 2016, Gould filed a petition pursuant to K.S.A. 44-512a(b) in the district court seeking a judgment against Wright to collect past due medical expenses awarded by the Board. Gould was ultimately awarded $106,886.98, the sticker price for his past due medical expenses.
- On February 22, 2016 the ALJ awarded penalties for nonpayment of benefits.
- On May 16, 2016 the Court of Appeals affirmed the Board's decision and found Gould's injuries compensable.

# *Gould* continued

- Following the Court of Appeals' Order, Wright made direct payments to two medical providers and then reimbursed Gould's health insurance provider, which had paid Gould's other medical providers.
  - These payments, totaling $58,459.68, covered all of Gould's outstanding medical bills.
- Gould brought an action in district court for direct payment of $106,886.98, arguing the Board's Order awarded a specific dollar amount to Gould that could not be satisfied by reimbursing Gould's private insurer at a discounted rate.
- The district court granted Gould's Motion for Summary Judgment, opining it had no authority to deviate from the Board's Order.
- The Court of Appeals affirmed, awarding Gould $114,721.53 for past due medical expenses and attorney's fees.

# Takeaways

- A stay of an award is unlikely to be granted during the pendency of an appeal before the Court of Appeals.
- Reimbursement of medical payments to claimant's providers and private insurer does not satisfy an Order for payment to the claimant for past due medical expenses.

# *Woessner v. Labor Max Staffing*, No. 119,087, 2020 WL 5083418 (Kan. Aug. 28, 2020)

*Drug Defense & Clear and Convincing Standard*

# Drug Defense and Admissibility of Test Results

K.S.A. § 44-501(b)(1)(A) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.

- The results of the test are admissible if:
  - As a result of an employer mandated drug testing policy, in place in writing prior to the date of accident or injury, requiring any worker to submit to testing for drugs or alcohol;
  - during an autopsy or in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;
  - the worker, prior to the date and time of the accident or injury, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident or injury;
  - the worker voluntarily agrees to submit to a chemical test for drugs or alcohol following any accident or injury; or
  - as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post-injury testing program and such required program was properly implemented at the time of testing.

# *Woessner v. Lab. Max Staffing*, (Kan. 2020)

- Claimant sustained a workplace injury, which resulted in his death. His wife sought death benefits under the Kansas Workers Compensation Act.
- During medical treatment, a urine sample was obtained and tested for presence of illegal narcotics.
- The sample was sent to Lab Corp. The results revealed the presence of marijuana metabolites.
- At the Regular Hearing, respondent introduced an affidavit and business records from the hospital and Lab Corp. regarding the collection and testing of the sample. The affidavits established the chain of custody of the sample, the licensure of the lab, and the GC/MS testing.

# *Woessner* continued

- Respondent deposed one of claimant's treating doctors in the ER, who testified the drug test was completed because claimant was incapacitated and to ensure the best medical treatment.
- Respondent also deposed the hospital's lab director. She explained the chain of custody requirements for a medical versus a legal drug test. Based upon her review of the records, she testified the requirements for a medical test were complied with and the test was not compromised.
- Finally, the respondent deposed a toxicologist. He opined on the concentration of THC metabolites in claimant's urine and the claimant's last use of marijuana.
- The claimant presented the testimony of a co-worker who expressed his opinion the claimant did not appear impaired.

# *Woessner* continued

- The ALJ admitted the test, concluded claimant failed to overcome the presumption of impairment, and denied claimant's right to benefits.
- On appeal, the Appeals Board reversed the ALJ's decision.
  - The Board determined the sample was collected by the employer, because it had requested the hospital to collect the sample.
  - It ruled the respondent was requires to establish the chain of custody beyond a reasonable doubt, which it had not done.
  - It applied K.A.R. 51-3-5a, which requires the testimonial support for the admission of a report, and because no one from Lab Corp had testified, it denied admission of the report.
  - Finally, it testified the testimony of the claimant's co-worker constituted clear and convincing evidence overcoming the statutory presumption of impairment.

# *Woessner* continued

- The Court of Appeals reversed the decision of the Board.
  - It ruled K.S.A. § 44-501(b)(3) does not apply, because the sample was collected by the hospital not the employer. K.S.A. § 44-501(b)(3) only applies to samples collected by employers.
  - K.A.R. 51-3-5a, which prohibits the admission into evidence for purposes of a final Award medical reports introduced at a preliminary hearing without subsequent testimonial support, does not apply to lab test first introduced at a Regular Hearing.
  - Hearsay is most certainly allowed in workers compensation proceeds, but its credibility must be weighed by the ALJ and Board. The Board erred when it excluded the lab tests.
  - The Board's reliance upon the co-workers testimony, without a more detailed explanation, was not sufficient to support its conclusion claimant had satisfied the clear and convincing standard required by the statute.

# *Woessner* continued

- The Supreme Court reversed the Court of Appeals but upheld admissibility of the sample.
  - K.S.A. § 44-501(b)(3) only applies to samples collected by employers.
  - K.A.R. 51-3-5a does not apply to lab test first introduced at a Regular Hearing.
  - Hearsay is allowed in workers compensation proceeds, but its credibility must be weighed by the ALJ and Board. Sufficient evidence indicated the lab tests were reliable.
    - Proof beyond-a-reasonable-doubt is not required to demonstrate chain of custody.
  - Co-worker's testimony that Woessner did not appear to be impaired was sufficient to overcome the presumption that impairment contributed to Woessner's accident by clear and convincing evidence.
    - Board's Award affirmed

# Takeaways

- Samples taken independent of the employer are not subject to K.S.A. § 44-501(b)(3).
- Chain of custody of drug samples does not need to be established by proof "beyond-a-reasonable-doubt."
  - Rather, hearsay evidence of a reliable chain of custody is weighed by the ALJ and Board to determine credibility.
- Credible co-worker testimony that claimant did not appear impaired at or around the time of accident may be enough to prove the claimant's impairment did not contribute to his accident by clear and convincing evidence.

# *Hawkins v. Southwest Kansas Co-Op Serv.*, 464 P.3d 14 (2020)

*Calculation of subrogation lien in comparative fault cases*

# K.S.A. § 44-504

- (a) When the injury or death for which compensation is payable under the workers compensation act was caused under circumstances creating a legal liability against some person other than the employer or any person in the same employ to pay damages, the injured worker or the worker's dependents or personal representatives shall have the right to take compensation under the workers compensation act and pursue a remedy by proper action in a court of competent jurisdiction against such other person.
- (b) In the event of recovery from such other person by the injured worker or the dependents or personal representatives of a deceased worker by judgment, settlement or otherwise, the employer shall be subrogated to the extent of the compensation and medical aid provided by the employer to the date of such recovery and shall have a lien therefor against the entire amount of such recovery, excluding any recovery, or portion thereof, determined by a court to be loss of consortium or loss of services to a spouse.
- (d) If the negligence of the worker's employer or those for whom the employer is responsible, other than the injured worker, is found to have contributed to the party's injury, the employer's subrogation interest or credits against future payments of compensation and medical aid, as provided by this section, shall be diminished by the percentage of the recovery attributed to the negligence of the employer or those for whom the employer is responsible, other than the injured worker."

# *Hawkins v. Southwest Kansas Co-Op Serv.*

- Hawkins was injured in 2006 when a boom crane he was working in collapsed.
- Hawkins brought civil actions in 2007 against JLG Industries, Western Steel, and United Rentals.
- Civil settlements against JLG Industries in early 2011 ($1.5 million paid over 20 years) and Western Steel in 2008 ($925,000).
- Jury trial in April 2011 against United Rentals.
  - The jury found no fault against Hawkins, United Rentals or JLG.
  - The jury found Western Steel 75% at fault and Respondent 25% at fault.
  - The jury found Hawkins' total damages to be $4,081,916.50.

# *Hawkins* Cont.

- Respondent paid $852,460.34 in workers compensation benefits.
- Respondent asserted subrogation interest against Hawkins' civil recoveries.
- The ALJ subtracted $375,000 (25% of Hawkins' $1.5 million settlement with JLG) from the $852,460.34 paid in workers compensation benefits.
  - Thus granting a subrogation lien of $477,460.34.
  - ALJ's decision was based on a formula from *Enfield v. A.B. Chance Co.*, 228 F.3d 1245 (10th Cir. 2000)
- Board affirmed the ALJ 3-2.

# *Hawkins* Cont.

- The Court of Appeals reversed the Board's decision.
  - Respondent was 25% at fault for $4,081,916.50 in damages, per the jury verdict.
    - $1,020,479.10
- Respondent's subrogation lien/future credit was reduced by $1,020,479.10.
- Thus, any lien or future credit cannot be applied until/unless the Respondent pays more than $1,020,479.10 in total workers compensation benefits.

# Takeaways

- A subrogation lien/credit is subject to reduction by the dollar amount of fault attributed to the employer by a jury, bench trial or employer-agreed settlement